Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

REGINALD P. BURGESS,

Petitioner.

JOHN D. WILLIAMS, Conservator of
CONSERVATORSHIP OF GEORGE W. WILLIAMS

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

This Petition mirrors that of *Marshall v Marshall*, No 04-1544, and the issues are the same, but the courts have simply ignored Petitioner and his rights under 11 USC 362.

In *Marshall v. Marshall* No. 04-1544. Argued February 28, 2006-Decided May 1, 2006 the court struck down a wide scope use of the probate exception, and re-iterated the limited scope enunciated in *Markham v. Allen,* 326 U.S. 490, 494 (1946), where this Court held that Congress did not confer on the federal courts jurisdiction to "probate a will or administer an estate." In the intervening sixty years, some federal circuits have hewn closely to *Markham,* while others have significantly expanded the scope of the so-called "probate exception," holding that it ousts otherwise proper federal jurisdiction even over claims between parties that are "ancillary" or "related" to probate. Here, the Court of Appeals aligned itself with circuits that have broadly applied the probate exception, holding that although bankruptcy jurisdiction over petitioner's claim was otherwise proper under 28 U.S.C. § 1334, that jurisdiction could not be exercised because petitioner's claim was "probate related" and shrouded it in service, and denied mandamus.

These decisions represent an irreconcilable split among the circuits over the scope of the probate exception. Accordingly, the questions presented are:

1. What is the scope of the probate exception to federal jurisdiction?

2. Did Congress intend the probate exception to apply where a federal court is not asked to probate a will, administer an estate, or otherwise assume control of property in the custody of a state probate court?

3. Did Congress intend the probate exception to apply to cases arising under the Constitution, laws, or treaties of

the United States (28 U.S.C. § 1331), including the Bankruptcy Code (28 U.S.C. § 1334), or is it limited to cases in which jurisdiction is based on diversity of citizenship?

4. Did Congress intend the probate exception to apply to cases arising out of trusts, or is it limited to cases involving wills?

5. Once adjudicated by the Code of Bankruptcy, may a Court ignore the Bankruptcy Code in any further rulings relying upon the Discharge order?

II

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Reginald P. Burgess and John D. Williams as Conservator of the Estate of George W. Williams

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Alan N. Resnick, et al., *Collier On Bankruptcy* (15th ed. 2004) 23

John F. Winkler, *The Probate Jurisdiction Of The Federal Courts,* 14 Probate L.J. 77 (1997) 1

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PETITION FOR WRIT OF CERTIORARI

It has only been since May 1, 2006 this Court last addressed the so-called "probate exception" to federal jurisdiction. In *Marshall v. Marshall* No. 04-1544, *Markham v. Allen*, 326 U.S. 490 (1946) was relied upon as the last of a long series of decisions in which the Court held that although Congress has not given the federal courts *in rem* jurisdiction to probate wills or administer decedents' estates, where federal jurisdiction is otherwise proper in actions *between parties*, it may be exercised even if the actions concern probate assets or issues, especially under 11 USC 362(h).

Since *Markham*, many circuits had deviated from this Court's probate-exception jurisprudence, and this petitioner was one such litigant caught in one of these deviations from not only the principles of *Markam*, but also from the Bankruptcy Code itself. While three circuits have held closely to *Markham* and its predecessors, others, including the Ninth Circuit in the present case, have applied the probate exception much more broadly, holding that federal courts may not entertain even *inter parties* claims that are in some fashion "ancillary" or "related" to probate, or that state law assigns to probate courts. A multiplicity of tests have developed, leading to inconsistent and unpredictable results.

The alarm has been sounded by many commentators. *See, e.g.*, John F. Winkler, *The Probate Jurisdiction Of The Federal Courts*, 14 Prob. L.J. 77, 135 (1997) ("The 'probate exception' . . . imposes limits so vague that the actions or relief it bars cannot be ascertained. Many courts have relied on formulaic standards that mask the absence of any coherent analysis. Others have been driven to impose arbitrary rules. Still others have confessed that no specific rules of application can be identified."); Peter Nicolas, *Fighting the Probate Mafia: A Dissection Of The Probate Exception To Federal Court Jurisdiction*, 74 5. Cal. L. Rev. 1479, 1483 (2001) (decrying the widespread "confusion as to [the] scope" of the probate exception). The alarm also has been repeatedly sounded by the circuit courts themselves. *See, e.g., Golden v. Golden*, 382 F.3d 348, 358 (3d Cir. 2004)

Now, especially in accord the clarity afforded in *Marshall*, this court has finally settled the jurisdictional question of the issues of how the Bankruptcy Code settles matters before as to finality in accord *Taylor v. Freeland & Kronz*, 503 US 638 (1992).

The "Probate Exception"; as it had become known as, was declared largely "dead" laid to rest as according to Justice Stevens in his Dissent "a decent burial in a grave adjacent to the resting place of the Rooker-Feldman doctrine. See Lance v. Dennis, 546 U. S. --, (2006) (STEVENS, J, dissenting) (slip op., at 2-3).

There thus can be little question that this Court's intervention is needed to clarify the scope of federal probate jurisdiction. The present opinion is a particularly appropriate candidate for this Court's review, for a number of reasons violating 11 USC 362(h)

- The opinion deepens the uncertainty over the scope of the probate exception by expressly rejecting the approaches of at least five other circuits, in favor of the approach adopted by just one court. Appendix ("Marshall App.") at 26-27.
- The opinion continues to affirm the probate exception in uncharted waters by applying it to divest a federal court of the plenary bankruptcy jurisdiction conferred by Congress, expressly rejecting another circuit's holding that the probate exception does *not* apply to bankruptcy jurisdiction. Marshall App. at 24-26.
- The opinion permits a significant, nonstatutory encroachment on federal subject matter jurisdiction that lacks any discernable principles to guide judicial discretion in violation of *Taylor*
- The opinion conflates *res judicata* and subject matter jurisdiction, an approach recently repudiated by this Court in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. —, 125 5. Ct. 1517 (2005).
- The opinion interprets the probate exception expansively, applying it to an *inter parties* tort action to

ignore an eviction that violates 11 USC 362 existing independently of the decedent's death, does not challenging the validity of decedent's testamentary documents, and involving administration of a probate estate not affecting any probate estate assets.

The confused state of the law on the scope of the probate exception has here permitted a federal court to reject jurisdiction over a properly-filed federal bankruptcy claim essentially because a related claim was pending in a state probate court. Earlier, this Court corrected a similar avoidance by a federal court of its obligation to hear a properly-filed federal case. In the context of the *Rooker-Feldman* doctrine, this Court cautioned federal courts against "overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts," and it stressed that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Exxon Mobil Corp.*, 125 S. Ct. at 1521, 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). The probate exception must be clarified so as to prevent an equally significant surrender of federal jurisdiction functionally identical to that condemned in *Exxon Mobil*.

The long-brewing conflicts among the circuits and the questions surrounding the nature and scope of the probate exception make this issue more than ripe for this Court's resolution. This Court should take this opportunity to bring order to the chaos of discretionary rulings under the Bankruptcy Code and grant certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not reported, but issued on June 9, 2006. The opinions of the United States District Court for the District of Delaware is not reported, but is a part of the record, as a post facto ruling when the petitioner filed for a writ of mandamus in reliance on the Bankruptcy order. The Delaware Bankruptcy Code orders are also not reported, but are a part of the record of this appeal.

JURISDICTION

The Court of Appeal only issued its final opinion as an order denying a petition for re-hearing en-banc on June 9, 2006

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court and Court of Appeals pursuant to 28 U.S.C. § 1331 and 1334.

STATUTES INVOLVED

28 U.S.C. § 1331, 1332 and 1334

STATEMENT OF THE CASE

An eviction was done while 11 USC 362 was in effect. The Third Circuit has completely skewed and understood this case inside out - backwards. Facts, times and rulings are wrong. The core case and discharge in LA02-37195ER is not mentioned, nor is USDC CDC 02-1043 DDP where Diversity was first raised.

George W. Williams, penniless - met June L. Patton in Los Angeles, CA in the mid 1940's. June, already married but separated; and George disappeared to the New York area, until June's mother fell ill, and at which time they re-appeared in the Los Angeles area now claiming they got married while in New York. There is no record that June ever divorced the first husband.

June and George lived together as "husband and wife" for over forty years and when June's Mother passed away, eventually the family home was given to her, and she added George to the title under the guise of husband and wife as joint tenants. Nearing the end of the road of life, when June discovered she had stage 4 lung cancer; June desired to pass on the family estate from her side of the family to her niece – her sister Ernestine's only child Karen D. Sparks, who was then wed to petitioner.

June and George in 1994 had joint wills drawn up by a family attorney – re-affirmed in 2001 without the assistance of

either Karen D. Sparks or petitioner – and nor did either party have knowledge of the contents or wording of the wills.

There was generally "bad blood" on the Williams side of the family to the Patton side and June had never allowed John D. Williams, George's brother and any of the Williams family into "her" house as long as she was with George.

June soon discovered the joint tenancy declaration of tenancy by her some forty years earlier had given a fifty percent share of the property to George W. Williams which upon her death would by State law revert to a full 100% share unless BOTH she and George passed away at the same time, in which case only then would the rights in the property pass to Sparks as stated in both June and George's joint "mirror" wills. At that point on August 10, 2001, June elected to – and George agreed – to sever the joint tenancy in favor of giving the property to Karen immediately by the vehicle of a trust, which compensated George with healthcare and a life estate at the property until what would be George's death.

The Trust was created using legal software and linked to the provisions of both June and George's Wills, and the property transferred to the Living Trust. George's trust was by state law irrevocable due to the fact that George named June as his initial trustee, and he was never the trustee of his own trust. Upon June's death the successor trustee would be Karen D. Sparks in both the trusts.

June passed on October 2, 2001, and when John D. Williams discovered that the property was in trust and he was not to be privy to the terms of the trust. He sent Adult Protective services to which they were provided a copy of the trust. They found George well cared for and the trust in order and closed the case.

John unhappy with the outcome initiated Conservatorship proceedings – first over the person only; then morphed them into proceedings over the Estate. At first they did not include the property – he morphed the proceedings into a seeking to recover the property by filing a PC 2520 petition. A State law repealed

on January 1st. The State courts ignored California State law itself and in a series of rulings, spread over two years, forced a bogus trial and ruled in contravention of state law.

Sparks distraught, broke down and fled to parts unknown with all the cash she could get her hands on without petitioner, and in total surprise to Petitioner. Petitioner, still married to Sparks, was left stranded in the middle of these Probate legal proceedings and living in the property at question.

Petitioner then filed for Bankruptcy in the Central District of California claiming the Probate proceedings had over-reached State law, and filed an adversary proceeding seeking the court put an end to the proceedings at the State level by Declaratory Judgment that the law had been satisfied in the trust. This was case number AD02-02571ER under LA02-37195ER filed by petitioner.

Conservator Williams properly served with AD02-02571ER went into default, but the court refused to enter e default and judgment, though properly moved to do so for what amounts to no good or lawful reason at all according the rules, Federal or Local.

Conservator then filed an adversary action as AD02-03224ER in the same bankruptcy seeking the court find the judgment from the State Court an exception to discharge under 11 USC 523(a)(4); but failed on a rule 12(b)(6) dismissal as moved for and filed by petitioner. At this point the State Court judgment was absolutely nullified under the Bankruptcy Code against petitioner, but NOT against Sparks as a joint and several debtor. Sparks did not jointly file Bankruptcy, or file at all anywhere as far as is known. Sparks did later file for divorce after the discharge was granted. Sparks had been named as a creditor in the Bankruptcy as well as Williams. Neither party appeared and objected in accord *Taylor*.

Petitioner's position has been the one in the same in reliance on *Taylor*, that the Bankruptcy Code itself closed this matter when no objection occurred, the property was so listed as a

homestead in the FULL value amount of the property. Ironically, *Marshall* was also going on across the hall from petitioner's Bankruptcy in the courtroom of the Honorable Samuel L. Bufford, and it is upon reason and belief and shared staff, the Marshall case affected petitioner's case by proxy.

REASONS WHY CERTIORARI SHOULD BE GRANTED

THE PROBATE EXCEPTION, AS RELIED UPON IN THIS CASE WHICH LED TO ABBERRANT RULING AFTER RULING, IS A NARROW, CONGRESSIONALLY-MANDATED LIMITATION ON FEDERAL PROBATE JURISDICTION AND MARSHALL HAS NOW AFFIRMED THIS.

A. This Court Has Repeatedly Held That There Is Federal Jurisdiction Over Probate-Related Actions *Between Parties.*

11 USC 362 cannot be violated to evict and not create a tort itself; though, this Court has articulated what lower federal courts have termed the "probate exception" to federal jurisdiction. In these decisions, this Court held there is no federal jurisdiction to probate wills or administer decedents' estates. The exception is a narrow one, however: The Court consistently has held that if federal jurisdiction is otherwise proper, whenever a controversy in a suit *between. . . parties* arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties. *Gaines v. Fuentes*, 92 U.S. 10, 22 (1876). In other words,

> "A citizen of another State may establish a debt against the estate. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. In like manner a distributee, citizen of another State, may establish his right to a share in the estate,

> and enforce such adjudication against the administrator personally, or his sureties, or against any other parties subject to liability, or in any other way which does not disturb the possession of the property by the state court." *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909) (quoting *Byers v. McAuley*, 149 U.S. 608, 620 (1893)) (citations omitted).

Thus, for example, in *Payne v. Hook*, 74 U.S. 425 (1868), this Court held that although a state probate action was then pending, there was federal jurisdiction over a plaintiff's suit to obtain her intestate share of her brother's estate. According to the Court, were it to conclude otherwise, an important part of the jurisdiction conferred on the Federal courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress? *Id.* at 429-30 Similarly by 11 USC 362, an eviction cannot occur under the automatic stay without actually creating an intentional tort action and right.

Similarly, in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, this Court held there was federal jurisdiction over a claim that a charitable bequest in a decedent's will failed and, accordingly, plaintiff was entitled to part of the decedent's estate. The Court explained,

> This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them. *Id.* at 43.

And, in *McClellan v. Carland*, 217 U.S. 268 (1910), the Court held there was federal jurisdiction to decide whether plaintiffs were "the sole heirs at law and next of kin of said decedent, and entitled to inherit the estate, real and personal." *Id.* at 275-76. The Court explained that the suit "was within the

original jurisdiction of the circuit court of the United States" because "the chancery jurisdiction of the Federal courts to entertain suits between citizens of different states to determine interests in estates existed from the beginning of the Federal government." *Id.* at 281. Thus, the circuit court erred in staying the federal action until a state suit could be resolved: It. . . appeared upon the record presented to the circuit court of appeals that the circuit court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This it has been steadily held, a Federal court may not do. *Id*[1] Enforcing 11 USC 362 is a DUTY.

The Court has given at least two explanations for the so-called probate exception. In *Gaines v. Fuentes,* the Court explained that a proceeding to probate a will is "one *in rem,* which does not necessarily involve any controversy between parties." 92 U.S. at 21. Thus, "the proceeding is not within the designation of cases at law or in equity *between parties of different States,* of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act." *Id.* at 22 (emphasis added).

Here, Petitioner had moved to Minnesota for health reasons to save his left leg from amputation, and was in the middle of completing the move, filed suit under diversity of citizenship in Federal Court to remove the proceedings and terminate them quickly. Judge Dean D. Pregerson dismissed that under the guise of Rooker-Feldman twice. Petitioner did indeed loose his left leg due these extended and aberrant proceedings of John D. Williams trapping the Petitioner in CA Probate hearing after hearing.

This is because if a controversy arises between parties concerning

[1] *See also Byers v. McAuley,* 149 U.S. at 618-22 (where parties were citizens of different states, federal court had jurisdiction to determine validity of handwritten will and cousins' intestate succession rights); *Gaines v. Fuentes,* 92 U.S. 10 (federal court had jurisdiction over suit to restrain enforcement of probate decree against owners of property claimed by decedent's heir).

the validity or construction of a will or the enforcement of a decree admitting it to probate, "there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." *Id.* Judge Pregerson was reversed by the Ninth Circuit

In other cases, the Court has explained that because the Judiciary Act of 1789 gave federal courts jurisdiction over "suits of a civil nature *at common law or in equity,*" 1 Stat. 73 (emphasis added), federal jurisdiction is coextensive with the jurisdiction of the English common law and chancery courts in 1789. *Markham,* 326 U.S. at 494. Since the probate of wills and the administration of decedents' estates were thought to be within the exclusive jurisdiction of England's ecclesiastical courts, federal jurisdiction did not include these matters. *Id.* at 494; *In re Broderick's Will,* 88 U.S. 503, 512 (1874). However, suits by heirs to establish their rights to probate estates were held to be outside the probate exception because, by the eighteenth century, English chancery courts routinely heard such suits. *Waterman,* 215 U.S. at 43.

B. *Markham v. Allen.*

This Court last addressed the probate exception in *Markham v. Allen,* 326 U.S. 490. *Markham* arose out of the death of a California resident who willed property to German citizens. The will was admitted to probate in state court, where decedent's American heirs claimed his entire estate because California law prevented German citizens from inheriting. *Id.* at 492. While the probate action was pending, the Alien Property Custodian, a federal officer, sued in federal court claiming he was entitled to the decedent's entire net estate. *Id.* The appellate court dismissed the action, holding that because the claim was within the probate court's jurisdiction, "its right to proceed to determine heirship cannot be interfered with by the federal court." *Id.* at 493.

This Court reversed. It held that although there is no federal jurisdiction "to probate a will or administer an estate," federal

courts have jurisdiction over "suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims" so long as they do not "interfere with the probate proceedings" or "assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at *494* (quoting *Waterman*, 215 U.S. at 43). The Court defined "interfer[ence] with the probate proceedings" narrowly, explaining that although a federal court may not "disturb or affect the possession of property in the custody of a state court," it *may* exercise jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession *save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. Id.* (emphasis added).

The Court held there was no improper interference with probate because, although the federal judgment awarded plaintiff decedent's *entire net estate*, it left "undisturbed the orderly administration of decedent's estate in the state probate court and decree[d] petitioner's right in the property to be distributed after its administration." *Id.* at 495. "This, as our authorities demonstrate, is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court." *Id.* Thus 11 USC 362 does not violate the exception either.

Under *Markham*, thus, the probate exception is extremely narrow. It is violated only when a federal court probates a will or distributes estate assets, not when it merely adjudicates rights to those assets. Indeed, *Markham* teaches that the probate exception is *not* violated when a federal court adjudicates a claim to estate assets, even if the claim is "against a decedent's estate," and even if a probate court will be "bound by the judgment to recognize the right adjudicated by the federal court." *Id.* At **494.**

As re-affirmed in *Marshall*, here the Probate estate, handled by State Law automatically, does not allow – nor show a need for Probate interference. The Probate proceedings were an abuse of process using the courts in even accord California Law itself.

Here, instead of ruling in accord the law, the courts avoided addressing the law at all due to the fact of law in flux in part because of *Marshall* moving through the Courts.

II. THE COURTS OF APPEAL ARE IRRECONCILABLY IN CONFLICT OVER THE REACH OF THE PROBATE EXCEPTION.

A. The Circuits Are In Conflict As To The Scope Of The Probate Exception.

In the nearly sixty years since *Markham*, the circuit courts have become profoundly split over the scope of the probate exception. The Second, Fifth and Eleventh Circuits (and the Ninth Circuit, before the present case) follow *Markham* and its antecedents closely, applying the probate exception only if a federal court is asked to probate a will or administer a decedent's estate. The Fourth, Sixth, Eighth and Tenth Circuits apply a broader rule, holding there is no federal jurisdiction over any claim that, under state law, would be adjudicated by a state probate court. The First, Third and Seventh Circuits apply a still-broader test, precluding jurisdiction over any claim that is in some fashion "ancillary" or "related" to probate. Finally, the Ninth Circuit in this case, as well as a single panel of the Second Circuit, have combined the two preceding tests to hold that the probate exception applies if a claim is in any manner "related to" probate *or* under state law would be adjudicated only in a probate court.

1. *Markham* test.

The Second, Fifth and Eleventh Circuits have closely followed *Markham* to hold that the probate exception applies only if a federal court is asked to probate a will, administer a probate estate or "order actual transfer of property under probate." *Turton v. Turton*, 644 F.2d 344, 347 (8th Cir. 1981).[2]

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[2] Before the present opinion, the Ninth Circuit also followed *Markham* closely. *See Hilton v. Mumaw*, 522 F.2d 588 (9th Cir. 1975) (probate exception did not bar suit alleging that defendant fraudulently induced

According to these courts, "Merely determining the rights to, as opposed to administering, assets is not proscribed by the probate exception." *Ashton v. Josephine Bay Paul and C. Michael Paul Foundation, Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990). Thus, while a federal court may not directly "distribut[e] . . . any assets" of a decedent's estate, it may adjudicate a party's "right to share in the estate." *Dulce v. Dulce*, 233 F.3d 143, 148 (2nd Cir. 2000). One court explained:

> The [probate exception] is easier to apply than to state. Under the heading of "establishing claims," for example, a creditor may obtain a federal judgment that he has a valid claim against the estate for one thousand dollars, or a devisee may obtain a declaratory judgment that a probated will entitles him to twenty percent of the net estate. What a federal court may not do, however, is to order payment of the creditor's thousand dollars, because that would be an assumption of control over property under probate. Similarly, the court may not find that the devisee's twenty percent share is worth $20,000, because it is the province of the probate court to determine the dollar amount of the net estate after liquidating assets and paying claims. Instead, the federal court is limited to declaring the validity of the asserted claims, leaving the claimants to assert their federal judgments as res judicata in the probate court.

Turton, 644 F.2d at 347; *see also Robertson v. Robertson*, 803 F.2d 136, 139 (5th Cir. 1986) (probate exception does not apply where federal judgment "will not disturb the administration of the estate by the [state] court for it will result solely in a decree between the parties to the federal suit"); *Michigan Tech Fund v. Century Nat'l Bank*, 680 F.2d 736, 740 (11th Cir. 1982) ("The probate exception does not foreclose a creditor from obtaining a federal judgment that the creditor has a valid claim against the estate for a certain amount.").

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decedent to transfer assets out of his estate); *Blacker v. Thatcher*, 145 F.2d 255, 256-57 (9th Cir. 1944) (under this Court's "settled rule," there was federal jurisdiction to resolve dispute between parties over rights under decedent's will, notwithstanding pending state probate action).

Because under this formulation the probate exception turns on estate *administration*, not the subject matter of the dispute, these circuits have permitted broad federal adjudication of probate-related matters. For example, these circuits have held there is federal jurisdiction to interpret a will, *Michigan Tech Fund*, 680 F.2d at 740 ("will interpretation is within the diversity jurisdiction of the federal courts, and not within the probate exception"); to determine the validity of claims under state forced heirship laws, *Robertson*, 803 F.2d 136; and over a claim for breach of agreement to make a will, *Michigan Tech Fund*, 680 F.2d at 740-4 1. There also is federal jurisdiction to determine whether disputed assets are part of a decedent's estate, *Ashton*, 918 F.2d at 1071-72; *Michigan Tech Fund*, 680 F.2d at 740-43; whether a judgment is enforceable against a decedent's estate, *Dulce*, 233 F.2d 143; and over a breach of fiduciary duty claim against an executor, *Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001).

2. State law test.

The Fourth, Sixth, Eighth and Tenth Circuits have held there is no federal jurisdiction over any suit that, under state law, is within the exclusive jurisdiction of state probate courts. In these circuits:

> "The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court; but where the suit merely seeks to enforce a claim *inter partes*, enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed."

Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999) (emphasis omitted) (citing *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988)).[3]

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[3] *See also Beren v. Ropfogel*, 24 F.3d 1226, 1228 (10th Cir. 1994) (same); *Lepard v. NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004) (same); *Thrja v. Thrja*, 118 F.3d 1006, 1009 (4th Cir. 1997) (" 'The law is well settled that the federal courts have no jurisdiction over matters within the

Because in these circuits federal jurisdiction depends on state law, the claims to which the probate exception applies vary greatly. Among the claims held barred are breach of fiduciary duty by an executor or trustee, *Bedo*, 767 F.2d 305; *Lepard*, 384 F.3d at 237; tortious interference, *id.*; *but see Rienhardt*, 164 F.3d at 1301; fraudulent inducement to make a will, *Sianis*, 294 F.2d 994; and undue influence, *Rienhardt*, 164 F.3d at 1300-01; *Turja*, 118 F.3d at 1008- 10.

3. "Ancillary' to probate" test.

In the First, Third, and Seventh Circuits, the probate exception applies if a claim is in some fashion "ancillary to" probate. The factors relevant to determining whether this test applies vary; they include the following.

First Circuit: In the First Circuit, suits "ancillary' to the probate of a will" are barred by the probate exception. Such suits include those "within the jurisdiction of the [probate court]" and those that "would require the district court to set aside the ruling of the probate court." *Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000).

Third Circuit: In the Third Circuit, the probate exception bars claims "ancillary' to probate," including those that would "assail or contradict a judgment of the probate court" or "challenge management of the estate." However, there is federal jurisdiction over otherwise barred causes of action that "would be maintainable *inter partes* in the state courts of general jurisdiction." *Golden v. Golden*, 382 F.3d 348, 358 (3rd Cir. 2004); *see also Moore v. Graybeal*, 843 F.2d 706 (3rd Cir. 1988).

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exclusive jurisdiction of state probate courts.' ") (quoting *Foster v. Carlin*, 200 F.2d 943, 947 (4th Cir. 1952)); *Bedo v. McGuire*, 767 F.2d 305, 305-07 (6th Cir. 1985) (probate exception applied because "under the law of Ohio exclusive jurisdiction of probate matters . . . is vested in the Probate Court"); *Sianis v. Jensen*, 294 F.3d 994, 998 (8th Cir. 2002) (federal jurisdiction over claim that will is invalid "depends on the remedy available to [plaintiff] under [state] law").

Seventh Circuit: In the Seventh Circuit, the probate exception bars claims "ancillary' to . . . core probate activities." Such claims include those that, if "maintained in federal court would impair the policies served by the [probate exception]." Those policies are legal certainty ("ensur[ing] that the outcomes of probate disputes will be consistent by limiting . . . litigation to one court system"), judicial economy ("avoid[ing] the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes"), "relative expertness" (vesting jurisdiction in those courts with "greater familiarity with such legal issues"), and "avoid[ing] unnecessary interference with the state system of probate law." *Storm v. Storm*, 328 F.3d 941, 943-44 (7th Cir. 2003) (citing *Dragan v. Miller*, 679 F.2d 712, 714-16 (7th Cir. 1982)); *see also Georges v. Glick*, 856 F.2d 971, 973-74 (7th Cir. 1988).

Courts applying the "ancillary to probate" test have refused jurisdiction over a broad range of probate-related matters, including tortious interference with inheritance, *Storm*, 328 F.3d at 944-47; *Moore*, 843 F.2d 706; *Dragan*, 679 F.2d at 715-17; *but see Golden*, 382 F.3d 348 (claim for tortious interference with inheritance held *not* barred by the probate exception); and breach of fiduciary duty by an executor, *Mangieri*, 226 F.3d 1; *Golden*, 382 F.3d at 361-62.

This issue was one of tortuous interference, as claimed by Petitioner and shown in the Federal action which was ignored

4. Hybrid test.

The Ninth Circuit in the instant matter, following the approach of a single panel of the Second Circuit, *see Moser v. Pollin*, 294 F.3d 335, 340 (2nd Cir. 2002), adopted the broadest definition of the probate exception by combining the "ancillary' to probate" and "state law" tests. Marshall App. at 27-28. Under this hybrid test, the court held the probate exception applies if a claim is "probate related" *or* under state law is within the exclusive jurisdiction of a probate court. Marshall App. at 28, 34. A claim is "probate related" if it raises any question "which

would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." Marshall App. at 28-29. Included in this expansive definition are *"all claims* regarding distribution of" decedent's assets, including "what [the decedent] had and what he did with it and whether that was proper or improper." Marshall App. at 30 (emphasis added).

The extraordinarily broad sweep of the hybrid test is starkly illustrated by the present case. In *Marshall*, Vickie's cause of action for tortious interference was against Pierce individually and made no claim against her husband's probate estate or testamentary trust, Marshall App. at 166; thus, it could have had no effect on estate administration. Vickie's claim also did not implicate her husband's testamentary intent, but rather his donative intent during his lifetime. *Marshall*, 271 B.R. at 867. Nor did her claim challenge the validity of his will or testamentary trust; to the contrary, it assumed those documents were valid. Marshall App. at 28, 166-67.[4] Instead, Vickie claimed — and the district court found — that her husband intended to create a *separate inter vivos* trust for her benefit, but that Pierce tortiously prevented him from doing so. Marshall App. at 132-37. Had the trust survived, it would have existed independently of, and had no effect on the validity of, the testamentary documents before the probate court. Moreover, because Vickie would have become the beneficial owner of the trust *during Howard's lifetime, Marshall*, 271 B.R. at 867, her claim against Pierce existed while Howard was still alive. Finally, Vickie's claim did not depend on Pierce receiving Howard's assets — her claim would have existed even if his wealth had been transferred to someone else. Same as too here with Petitioner because the

[4] Though the district court examined evidence of the suspicious circumstances surrounding the execution of the testamentary trust, Vickie's claim does not rest upon the assertion that the will or testamentary trust are invalid. According to the court, "Although there is evidence that J. Howard's Living Trust was forged or tampered with, that is only some evidence of Pierce's tortious interference, and evidence to negate Pierce's contention that J. Howard had no donative intent." June 12, 2002 Order Den. Counter-Defendant's Mot. To Stay J. Pending Appeal, U.S.D.C. Docket No. 442, p. 4 n.2. Here too with petitioner, no claim to adjudicate the Williams trusts was sought.

property was transferred before death.

In this case, the trust was never lawfully challenged nor litigated, and a null judgment was produced, but the court simply did not care and kept writing null order after null order until it ordered the sheriff to seize property in violation of all law. The sheriff's department though sued, acted as if it could not tell the order was void and vacated; even when supplied with the Probate Courts' order vacating the ruling that was eventually used against petitioner. In short a railroad job ignoring 11 USC 362 and sec (h)

Thus, under the rule articulated by the Ninth Circuit, the probate exception could apply to *any* claim related to assets held by a decedent before or at his death, regardless of the nature of the claim or the claim's utter lack of impact on probate administration, which of course never happens -- but in theory under a trust.

The courts in Petitioner's case continued to use this erroneous Ninth Circuit rule being used to violate 11 USC 362 – and it was not reversed until AFTER Petitioner was ousted from his own property using the Ninth Circuits' then position.

B. The Circuits Are In Conflict As To Whether The Probate Exception Applies To Federal Question Cases.

This Court has never directly addressed whether the probate exception applies to federal question cases generally or to bankruptcy cases specifically.[5] The Eleventh Circuit has twice

[5] The opinion below erroneously asserts that this Court twice has held that the probate exception applies to federal question cases. Marshall App. at 26. It has not. In *Harris v. Zion's Savings Bank & Trust Co.*, 317 U.S. 447 (1943), the only question before the Court was one of statutory construction — whether Congress intended to confer powers on an estate administrator that state law expressly forbade. The Court referred to the limitation on federal probate jurisdiction in construing the relevant statute, but it did not hold that the federal courts lacked jurisdiction under the probate exception. *Id.* at 450-52. Indeed, had it so concluded, it would

considered the issue, holding that the probate exception does *not* apply to federal question cases. In *Glickstein v. Sun Bank/Miami*, 922 F.2d 666, 672 n.13 (11th Cir. 1991), the Court held that "the probate exception is an exception to diversity jurisdiction and has no application to the federal RICO claims." The Court similarly held in *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1565 (11th Cir. 1988):

> Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction. That exception related only to 28 U.S.C. § 1332 (1982), and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases.[6]

The Ninth Circuit opinion in *Marshall* "specifically reject[s]" the Eleventh Circuit's analysis, holding that the probate exception applies to federal question cases, including bankruptcy cases. Marshall App. at 26.[7] The Court offered no real doctrinal

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have dismissed for want of jurisdiction and, thus, it would not have had occasion to reach the statutory question. *Markham v. Allen* also did not address this issue because it had no reason to do so; although *Markham* concerned issues of federal law, this Court held that the probate exception did not apply for other reasons, and therefore had no occasion to discuss whether the probate exception applies to federal question cases generally. *Marshall* has now cleared this up.

[6] Contrary to the Ninth Circuit's characterization, *Marshall* App. at 25, the quoted language in *Goerg* is not *dicta*. The issue there was whether a bankruptcy court had the power to grant a foreign trustee's petition for ancillary administration. The Eleventh Circuit held that the bankruptcy court had such power — a conclusion it could not reach without first concluding that federal jurisdiction was not ousted by the probate exception. *Goerg*, 844 F.2d at 1564-68.

[7] The district courts were similarly split. *See, e.g., Community Ins. Co. v. Rowe*, 85 F. Supp. 2d 800, 806 (S.D. Ohio 1999) (probate exception did not apply to ERISA claim because it "has been applied only in the context of diversity jurisdiction"); *Williams v. Adkinson*, 792 F. Supp. 755, 761 n.9 (M.D. Ala. 1992) ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."); *Powell v. American Bank & Trust Co.*, 640 F. Supp. 1568,

explanation for its conclusion, stating only that the "evil" of "federal interference with state probate proceedings" "is as relevant to federal question cases as it is to diversity ones." *Id.*[8]

This of course was finally rejected as a finding in *Marshall* that the Ninth Circuit had no warrant to come to such a wide sweeping conclusion using the "Probate Exception" doctrine.

C. This Court Should Clarify The Scope Of The Probate Exception.

Only this Court can resolve the conflicts among the rules of mandamus shared by all the circuits under Bankruptcy Codes and Law and thus authoritatively explicate the scope of the probate limitation on federal jurisdiction. Without such clarification, parties and courts will continue, as here, to spend years litigating the merits of such matters, only to learn at the end of the appellate process that the lower court never had jurisdiction to act.[9]

1574-75 (ND. Ind. 1986) ("probate exception applies to diversity jurisdiction; there is nothing to suggest that a federal court cannot take jurisdiction over a federal question raised by a plaintiff"); *but see In re Estate of Threefoot*, 316 F. Supp. 2d 636, 642 (W.D. Tenn. 2004) ("probate exception is not limited to diversity cases"); *In re Estate of Lewis*, 128 F. Supp. 2d 573, 574 & n.3 (ND. Ill. 2001) (same).

[8] The Eighth Circuit Bankruptcy Appellate Panel has also recently applied the probate exception to a bankruptcy matter, similarly without any analysis of why the probate exception applies in a non-diversity context. *Litzinger v. Estate of Litzinger (In re Litzinger)*, 322 BR. 108 (B.A.P. 8th Cir. 2005).

[9] The present case illustrates how costly the absence of clear rules can be. Before being reversed by the Ninth Circuit, both the bankruptcy and the district courts carefully considered the scope of their jurisdiction and concluded that the probate exception did not apply. Thus, they twice tried the merits of petitioner's tortious interference claim and awarded multi-million dollar judgments. The two trials and appeal of that claim took over nine years to resol[illegible]nd resulted in "one of the most extensive records ever produced in the [illegible]ntral District of California." Marshall App. at 23.

Moreover, because Vickie dismissed her tortious interference claim in Texas after prevailing in federal court, if the federal judgment is not

III. THE NINTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE PROBATE EXCEPTION PERMITS AN UNWARRANTED AND UNBOUNDED INTRUSION ON FEDERAL JURISDICTION THAT HAS NO STATUTORY BASIS.

A. The Ninth Circuit's Approach Is Un-moored To The Congressional Grant Of Federal Jurisdiction And Contravenes The Bankruptcy Code.

As discussed above, under this Court's opinions, there is no federal jurisdiction to probate a will or administer a decedent's estate because "the equity jurisdiction *conferred by the Judiciary Act of 1789*, 1 Stat. 73, and § 24(1) of the Judicial Code . . . did not extend to probate matters." *Markham*, 326 U.S. at 494 (emphasis added). As applied by this Court, thus, the probate exception is firmly grounded in Congress's grant of jurisdiction to the federal courts - it is not a judicially-crafted exception to it.

In contrast, the Ninth Circuit's application of the probate exception neither mentions the applicable statutes nor purports to interpret them. *Nowhere* in its lengthy opinion does the Ninth Circuit cite or discuss the historical basis of the probate exception or the statutory grant of federal question jurisdiction (28 U.S.C. § 1331) to the federal courts. Nor does it discuss the statutory grant of bankruptcy jurisdiction (28 U.S.C. § 1334) or any provision of the Bankruptcy Code. To the Ninth Circuit, no such discussion is necessary because it saw the probate exception as a judicially-crafted doctrine that exists separate from any statutory source.

But such an approach co-opted power that the Constitution gives to Congress: "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (citing U.S. Const., Art. III, § 1). While courts may interpret the statutes that grant federal jurisdiction,

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reinstated, she could forfeit her claim entirely.

Here, the Petitioner while being meritorious at all stages, was ignored in favor of members of the Bar pursuing Abuses of Process to ignore lawful orders and 11 USC 362 in particular.

they may not carve out exceptions to them. The Ninth Circuit violated this tenet, effectively creating a jurisdictional exception that has no statutory foundation and, thus, no limiting principles.

The absence of limiting principles is what allowed the extravagance of the Ninth Circuit's extension of the probate exception. The opinion variously (and inconsistently) placed the present case within the probate exception because the case raises "questions which would ordinarily be decided by the probate court in determining the validity of the decedent's estate planning documents" (Marshall App. at 29); invites findings of fact "in direct and irreconcilable conflict with the Texas probate court's judgment" (Marshall App. at 30); "interfere[s] with the Texas probate court proceedings" (Marshall App. at 31); is "nothing more than a thinly veiled will contest" *(id.);* and "negated . . . the power of the Texas probate court" (Marshall App. at 32). It thus provides no real guidance in future cases and permits federal judges virtually unbounded discretion in determining whether federal jurisdiction exists then to ignore 11 USC 362.

Here John Williams did exactly the same thing. Williams brought a Conservatorship action veiled in property rights under a Death issue that sought to take more property than George W. Williams was entitled to. Instead of obeying their failures under law, the counselors simply ignored the law and depend now on their veiled protections as members of the bar to get away with contempt of court as to orders and theft by taking. Records remain against them so strongly any legal professional cannot help but see that the State Courts continued to act without jurisdiction. The courts all turned a deaf ear and blind eye to this with "denied".

The Ninth Circuit *Marshall* opinion also presented a particular threat to bankruptcy jurisdiction that did not stop at the specifics of that case, as was proved by this case. The court held here that where probate and bankruptcy courts share an interest in the same assets — the probate court, for distribution to heirs; the bankruptcy court, for distribution to creditors — the bankruptcy court must defer to the probate court's adjudication. But the plain language of the Bankruptcy Code provides otherwise. Pursuant to

its constitutionally-based plenary power over bankruptcy, Congress has given federal courts exclusive jurisdiction of all cases under the Bankruptcy Code, and "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." 28 U.S.C. § 1334 (a)-(b). Exclusive federal jurisdiction extends to "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e). Congress has also provided for an automatic stay of other litigation affecting the bankrupt or the bankruptcy estate, 11 U.S.C. § 362; *Citizens Bank v. Strumpf*, 516 U.S. 16, 21 (1995), and it has given federal courts sitting in bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code, 11 U.S.C. § 105(a). Petitioner argued this and was ignored.

This court's *Marshall* ruling cleared this up also as absolutely being true as to especially the stay of 11 USC 362.

Congress has also specifically provided for continuing federal bankruptcy jurisdiction even when a party's death leads to the creation of a probate estate with an interest in bankruptcy estate assets. For example, pursuant to express bankruptcy rule, the death of a Chapter 7 debtor "shall not abate" the bankruptcy action; "[i]n such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the [death] had not occurred." Bankr. R. 1016; *see also In re Gridley*, 131 B.R. 447, 449-51 (D.S.D. 1991). Thus, "the bankruptcy proceeding will continue in rem with respect to property of the [bankruptcy estate]," and "only property exempted from property of the [bankruptcy] estate or acquired by the debtor after the commencement of the case and not included as property of the [bankruptcy] estate will be available to the representative of the debtor's probate estate." H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978), *quoted in* Alan N. Resnick, et al., Collier On Bankruptcy 1016.02 & n.12 (15th ed. 2004); *In re Gridley*, 131 B.R. at 450. The Bankruptcy Code thus expressly provides for federal court jurisdiction over assets relevant to both

bankruptcy and probate proceedings which includes "possession" under 11 USC 362.

Under the Bankruptcy Code, thus, it is the *federal bankruptcy court*, not the state court, that controls the adjudication of disputes common to bankruptcy and other forums. The Ninth Circuit's approach has exactly the opposite effect: It permited only *probate courts* to exercise exclusive jurisdiction over assets common to bankruptcy and probate estates.

Of course the Marshall ruling also cleared this up, and thus when the discharge was granted, without objection and then Williams failed on the 11 USC 523(a)(4) challenge in the resulting 12(b)(6) dismissal, the judgment was voided completely as to Petitioner and each and every court – Federal and State was mandated to follow the discharge declaring the state court probate order null and uncollectible.

B. The Ninth Circuit's Approach Misunderstands Equity's Historic Role In Adjudicating Trust Matters.

The Ninth Circuit's *Marshall* opinion held that although Vickie claimed interference with a trust, not a will, there was no federal jurisdiction because "[t]he probate exception applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property." Marshall App. at 33.[10] This analysis fundamentally misunderstands the historic role of courts of equity in trust matters. ***Trusts are a contract to bequeath.***

As noted above, this Court has traced the probate

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[10] Other courts have similarly held. *See, e.g., Storm v. Storm*, 328 F.3d at 947 (probate exception applies "despite this being a dispute over the terms of an *inter vivos* trust rather than a traditional will"); *Golden v. Golden*, 382 F.3d at 359 (probate exception applies to "trusts that act as 'will substitutes' "); *Sianis v. Jensen*, 294 F.3d at 999 ("Other courts, including our own, have recognized that there might be instances when the probate exception applies in diversity actions involving trusts").

exception's origin to the Judiciary Act of 1789, which granted the lower federal courts jurisdiction over "all suits of a civil nature *at common law or in equity*. .. . "Because the probate of wills and administration of decedents' estates were thought to be ecclesiastical matters, not matters for the common law or equity courts, federal jurisdiction was held not to include them. *Id. Trusts,* however, were on an entirely different footing. "[A]t common law, the courts of equity had *exclusive* jurisdiction over virtually all actions by beneficiaries for breach of trust." *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 256 (1993) (emphasis added) (citing *Lessee of Smith v. McCann,* 65 U.S. 398, 407 (1861)); *Waterman,* 215 U.S. at 43 ("This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction . . . in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them."); *Payne v. Hook,* 74 U.S. at 431 ("It is . . . well settled that a court of chancery, *as an incident to its power to enforce trusts* . . . has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.") (emphasis added); *see also* Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction,* 745. Cal. L. Rev, at 1513-14 & n.202, 203 ("In eighteenth century England, the entire system of trust was within the exclusive jurisdiction of chancery, and chancery would thus never refuse to adjudicate matters relating to trusts."); F.W. Maitland, Equity 23 (1932) ("Of all the exploits of Equity the largest and most important is the invention and development of the Trust.").

In the Marshall case, Vickie's action was for interference with an *inter vivos trust,* not a will. Her claim, thus, was within the historic equity jurisdiction of the federal courts, and it should not have been held excluded by the probate exception.

In the present case, like in *Marshall,* Petitioner's issues surrounded ALSO interference with an inter vivos trust – not a will. In fact the Wills were admitted into evidence as valid in the proceedings, but had no relevance. In this case "mysteriously" the issue of the Wills simply being rolled into the Trusts as codicil documents was ignored. It would have totally

validated the Trusts for the contracts that they were between June, George and Sparks.

C. The Ninth Circuit's Approach Fundamentally Misconstrues *Markham's* "Interference" Analysis.

A significant concern driving the Ninth Circuit's probate exception analysis is avoiding "[t]he evil . . . [of] federal interference with state probate proceedings." Marshall App. at 26; *see also* Marshall App. at 31 ("it is clear that the exercise of federal jurisdiction would and, in this case, did *interfere* with the Texas probate court proceedings"). According to the opinion, impermissible interference occurs when a federal court adjudicates issues that "would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." Thus, in the Ninth Circuit's analysis, the probate exception is invoked — and hence federal jurisdiction eviscerated — when a federal court is asked to adjudicate an issue over which a probate court also has jurisdiction.

The ostensible root of the Ninth Circuit's "interference" analysis is *Markham v. Allen,* in which this Court held that a federal court may entertain a suit "in favor of creditors, legatees and heirs" as long as it does not "interfere" with the probate proceedings. 326 U.S. at 494. The "interference" *Markham* cautioned against, however, expressly was *not* federal adjudication of an issue pending before a probate court. To the contrary, *Markham* held that a federal court *may* adjudicate an issue common to state and federal proceedings, even where a federal judgment will bind the state court. *Id.* (federal court may "adjudicate rights in [decedent's] property where the final judgment does not undertake to interfere with the state court's possession *save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court")* (emphasis added). Thus, while the Ninth Circuit's opinion adopts the language of *Markham,* its analysis was fundamentally inconsistent with it. This was really a Diversity contract case.

Since *Marshall* affirmed the inconsistent position of the

Ninth Circuit and this Petition follows *Marshall* – there is no reason this court should not grant Certiorari to this Petitioner also. The Federal court ruled in the 11 USC 523(a)(4) proceedings and affirmed the discharge of the judgment as to Petitioner.

D. The Ninth Circuit's Approach Rejects The Well-Established Concept Of Parallel State And Federal Jurisdiction And Improperly Imports Preclusion Principles Into Its Jurisdictional Analysis.

The Ninth Circuit also held that there is improper interference with a probate proceeding — and hence no federal jurisdiction — if a probate claimant is given "a second chance to litigate her claim against the estate," thus "negat[ing] . . . the power of the . . . probate court." Marshall App. at 29, 32-33. By so holding, the Ninth Circuit made the very same error — improperly eschewing federal jurisdiction by conflating *res judicata* and jurisdiction — that this Court recently disapproved in *Exxon Mobil Corp. v. Saudi Basic Indus., Corp.*, 544 U.S. —, 125 S.Ct. 1517 (2005). Petitioner on the heels of *Marshall* thus suffered bad law.

In *Exxon*, the Court rejected an approach to the *Rooker-Feldman* doctrine that held that where the same issues are concurrently before state and federal courts, federal jurisdiction terminates upon entry of a state court judgment. The Court explained that while "[c]omity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation," properly invoked concurrent jurisdiction does not "vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id.* at 1527. The Court explained:

> Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. . . . *Preclusion, of course, is not a jurisdictional matter.* In parallel litigation, a federal court may be bound to recognize the claim — and issue — preclusive effects of a

> state court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Id. (emphasis added) (citation omitted).

The Court emphasized, moreover, that the federal statutory scheme permits concurrent state and federal adjudication of claims and, thus, that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id.* at 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).[11] Accordingly, the Court cautioned against an expansion of *Rooker-Feldman* that would "overrid[e] Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." *Id.* at 1521. Here Federal Diversity jurisdiction did supersede state Probate Court jurisdiction under contract theory – and was ignored also.

A similar analysis should govern in the present context. Contrary to what the Ninth Circuit held, because a pending state court action "is no bar to proceedings concerning the same matter in the Federal court," *id.* At 1526-27, the fact that an issue before the federal court could be decided by a state probate court should be irrelevant if federal jurisdiction is otherwise proper. A prior state court judgment also should be irrelevant to the jurisdictional analysis; while a prior judgment may have preclusive effect, federal jurisdiction nonetheless exists because "[p]reclusion . . . is not a jurisdictional matter." *Id.* at 1527. Diversity existed.

E. The Ninth Circuit's Approach Improperly Imports State Law Into Its Jurisdictional Analysis.

Under the second prong of the Ninth Circuit's hybrid test, there is no federal jurisdiction if "[the] state's trial courts of general jurisdiction do not have jurisdiction to hear probate

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[11] Significantly, *McClellan v. Carland* is a probate exception case, in which this Court held that federal jurisdiction was properly exercised over a probate-related matter.

matters." Marshall App. at 34. This approach runs counter to this Court's repeated admonition that because federal jurisdiction is created by federal statute, it is unaffected by state law.[12] According to *Payne v. Hook*, 74 U.S. 425, 430 (1868):

> We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

The Court similarly held in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) (emphasis added):

> [I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts . . . the jurisdiction may be exercised, *and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.*

See also Hayes v. Pratt, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction"); *Green's Adm'x v. Creighton*, 64 U.S. 90, 107-08 (1860) ("a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent

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[12] The error was compounded in this case because the Ninth Circuit did not independently analyze Texas law, but instead held, without doing a preclusion analysis, that it was bound by the probate court's erroneous conclusion that it had exclusive jurisdiction over Vickie's claim. Marshall App. at 34; *compare* Marshall App. at 165-70. Also here – the Bankruptcy Courts failed to analyze California Probate Trust Law to determine the state judgment was actually null and void.

estates").

Accordingly, following the Ninth Circuit, the Third Circuit then erred in denying mandamus making federal jurisdiction depend on whether a probate court determines that it has exclusive jurisdiction over a petitioner's claim under state law.

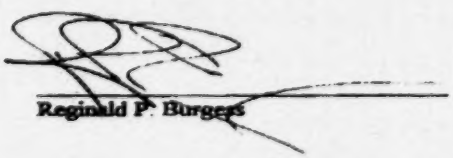
The Third Circuit did a defamatory de novo review that was completely incorrect. Still, it never addressed the discharge correctly, nor the effect under law wrongly relying on *Markham*. The courts have refused to properly address the law to provide proper relief, and instead have defied this courts *Taylor* ruling

The Delaware Bankruptcy court couched a 11 USC 362 denial in an issue surrounding service though improper by FRBP 7004(b)(2). Because Petitioner's case was going on using a shared court staff to a Senior Bankruptcy Judge, similar rulings as to *Marshall* hit Petitioner for similar reasons of "abstention" when indeed the State Court had lost jurisdiction, never regained it as to petitioner, and it continued issuing orders that were void; and, OBLIGATED to be ignored by all Federal courts and petitioner was and is entitled to enforcement of his discharge order and also damages to his person and business under the principles of law in tort and tortuous interference with inheritance by the command of Congress found at 11 USC 362(h) also preventing "evictions."

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

I declare by the laws of the State of Delaware under penalty perjury the above is true and correct signed at Wilmington, Delaware this 6th day of September, 2006



Reginald P. Burgess

APPENDICES

Item A . . . . . Order denying en banc re-hearing

Item B . . . . . Order preventing appendix filing

Item C . . . . . Order denying Mandamus

Item D . . . . Memorandum on Mandamus Order

APPENDIX ITEM A

CPS 180

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1860

IN RE: REGINALD P. BURGESS,
Petitioner

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE,
RENDELL
BARRY, AMBRO, FUENTES, SMITH, FISHER,
VAN ANTWERPEN, CHAGARES, *NYGAARD and
**ROTH, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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*The vote of the Honorable Richard L. Nygaard, Senior United States Circuit Judge, is limited to panel rehearing.

**Judge Roth assumed Senior Status as of May 31, 2006

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: 9 June 2006

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APPENDIX ITEM B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May 23, 2006

No. 06-1860

IN RE: REGINALD P. BURGESS, Petitioner

(Related to Delaware D.C. No. 05-cv-00677)

Present: BARRY, SMITH and NYGAARD, Circuit Judge.

Motion by Petitioner Pro Se entitled "L.R. 27.5 Motion As Request For Review Of Act Of Single Judge Which Violates L.R. 35.3 - The Filing Of Required Appendix To The Petition And Panel's Order" Construed as a Motion to Reconsider the Court's **5/17/06** Order denying the Motion to file Exhibits in Support of the Petition for Rehearing.

/s/ Anthony Infante
Anthony Infante
Case Manager 267-299-4916

Petition for Rehearing was submitted to the full Court on 4/28/06.

For the Court's Information, a copy of the Court's 5117/06 Order and the Exhibits are included.

ORDER

The foregoing Motion to Reconsider is DENIED.

By the Court,

/s/ D. Brooks Smith
Circuit Judge

Dated: 6 June 2006
AWI/CC: RPB MBJ

APPENDIX ITEM C

CPS-180

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1860

IN RE: REGINALD P. BURGESS,

Petitioner

On a Petition for Writ of Mandamus from the United States District Court for the District of Delaware
(Related to D.C. Civ. No. 05-cv-00677-GMS)

Submitted Under Rule 21, Fed. R. App. P.
March 30, 2006

Before: BARRY, SMITH AND NYGAARD, Circuit Judges.

JUDGMENT

This cause came on to be heard on a petition for writ of mandamus. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the petition for writ of mandamus be, and the same is, denied. All of the above in accordance with the Opinion of the Court.

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ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: 21 April 2006

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APPENDIX ITEM D

CPS-180 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1860

IN RE: REGINALD P. BURGESS,
Petitioner

On a Petition for Writ of Mandamus from the
District Court for the District of Delaware
(Related to D. Del. Civ. No. 05-cv-00677-GMS)

Submitted Under Rule 21, Fed. R. App. P.

March 30, 2006

Before: BARRY, SMITH AND NYGAARD, Circuit Judges

(Filed: April 21, 2006)

OPINION

PER CURIAM

Petitioner Reginald Burgess asks this Court for a writ of mandamus to direct the District Court to rule on his pending mandamus petition. Although he alleges that an emergency exists with respect to a property located at 1715 5. Victoria Ave., Los Angeles, California, we find that no emergency exists and that a four-month delay is not

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so long as to create a right to the writ. We will deny the request.

The facts and procedural history of this case are complex. Burgess has been the plaintiff, or at least an interested party, in numerous cases in the California state and federal courts. He has also filed several suits in the Delaware federal courts, In 2001, Burgess and his ex-wife, Karen Sparks, served as caretakers for June Williams, who owned the property at 1715 Victoria Ave. Burgess convinced George Williams, one of June's sons, to transfer his property interest in the house to Sparks. See Burgess v. Williams, No. 04-09129 (C.D. Cal.). Sparks then transferred her interest to Burgess. Upon June Williams' death, John Williams, George's brother, brought a probate action in the Superior Court of Los Angeles County trying to void the property transfer to Sparks and Burgess. See No. BC263257 (Cal, Super. Ct.). The Superior Court found George Williams was incompetent at the time he made the transfer and appointed John Williams the conservator of the estate. Despite the court order, Burgess did not transfer his interest in the property to Williams, as the conservator. See In the Matter of the Conservatorship of George W. Williams, No. BP070275, orders issued Aug.-Sept. 2002 (Cal. Super. Ct.).

Although the matter continued in state court, Burgess filed a Chapter 7 Bankruptcy petition in the Bankruptcy Court for the Central District of California, automatically staying the transfer. See In re Burgess, No. 02-37195 (Bankr. C.D. Cal,). Before the stay was lifted, Burgess filed a bankruptcy petition under Chapter 11, receiving an additional

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stay. See In re Burgess, No, LA 04-28183-ER, slip op. at 4 n.4 (Bankr. C.D. Cal. Oct. 27, 2004). The Bankruptcy Court dismissed the Chapter 11 filing on October 27, 2004, concluding that the filing was in bad faith. Id. The United States District Court for Central District of California affirmed. See Burgess v. Williams, No. 04-cv-09129-DDP, slip op. (C.D. Cal. Jan 18, 2005). Burgess appealed to the Court of Appeals for Ninth Circuit several times, but the Court has not provided Burgess with any of the relief he seeks. See In re Burgess, 146 Fed. Appx. 921 (9th Cir. Oct. 25, 2005); Williams v. Burgess, 146 Fed. Appx. 924 (9th Cir. Oct. 25, 2005).

On July 21, 2005, before the Ninth Circuit ruled on his appeals, Burgess filed a voluntary petition under Chapter 13 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware. The main item of contention was again the distribution of the property at 1715 S. Victoria Ave. On July 26, 2005, Burgess was evicted from the property. We are unsure who currently holds possession. On August 3, 2005, Burgess filed a motion for enforcement of the automatic stay pursuant to I 1 U.S.C. § 362. The appointed Trustee filed a motion for a change of venue back to the Bankruptcy Court for the Central District of California. The Bankruptcy Court for the District of Delaware granted the Trustee's motion on September 8, 2005.

Almost immediately thereafter, Burgess filed a petition for a writ of mandamus in the United States District Court for the District of Delaware seeking a ruling preventing the Bankruptcy Court from transferring the action to California. On December 12, 2005.

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Burgess filed an amended motion for the issuance of a writ. The District Court has yet to act on the petition. He now seeks a writ of mandamus from this Court.

II.

A writ of mandamus is an extraordinary remedy which should be invoked only in extraordinary situations. See Kerr v. United States Dist. Ct., 426 U.S. 394, 402 (1976). Burgess must show that he has an indisputable right to the writ and that there exists no other adequate remedy. See Haines v. Liggett Group Inc. 975 F.2d 81, 89 (3d Cir. 1992).[1]

Some delays may be so prejudicial that they warrant mandamus relief, See Madden v. Myers, 102 F.3d 74, 79 (3d Cir. 1996); Johnson v. Rogers, 917 F.2d 1283, 1285 (10th Cir. 1990); Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978). Normally, the four-month delay would not be so long as to warrant mandamus relief. However, Burgess alleges that an emergency exists because he will lose his property. We disagree that this is an emergency for several reasons. First, Burgess has already been evicted, eliminating the urgency in preventing the taking in the first place, and he does not allege that the property will be damaged. Second, if the District Court issued a writ reversing the transfer decision, it would not guarantee that the Bankruptcy Court will enforce the automatic stay provision. For instance, the Bankruptcy Court might decide that it lacks

[1] 1 We note that "{m]andamus is... the appropriate mechanism for reviewing an allegedly improper transfer order." In re United States, 273 F.3d 380, 385 (3d Cir. 2001) (quotations and citations omitted).

jurisdiction over property within the control of a state probate court, See Markham v. Allen, 326 U.S. 490, 494 (1946), or it could find that one of the exceptions to the automatic stay applies. See 11 U.S.C. § 362(b). Accordingly, Burgess does not show he has an indisputable right to writ and his petition for a writ of mandamus will be denied.

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